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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1995

GILBERT ROSS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent

REPLY TO GOVERNMENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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REPLY

1. We argued in our petition that, though paying lip service to Jackson v. Virginia, 443 U.S. 307 (1979), the Court of Appeals' review here was in complete violation of Jackson's principles. This Court re-emphasized in Jackson that the

> standard of proof beyond a reasonable doubt "plays a vital role in the American scheme of criminal procedure," because it operates to give "concrete substance" to the presumption of innocence, to ensure against unjust convictions, and to reduce the risk of factual error in a criminal proceeding. [In re Winship, 397 U.S 358,] 363. At the same time, by impressing upon the factfinder the need to reach a subjective state of near certitude of the guilt of the accused, the standard symbolizes the significance that our society attaches to the criminal sanction and thus to liberty itself. Id., at 372 (Harlan, J., concurring).

The Court continued, in words ignored by the panel below: "[A] mere modicum of evidence may satisfy a "no evidence" standard .... But it could not seriously be argued that such a "modicum" of evidence could by itself rationally support a conviction beyond a reasonable doubt."

While the panel professed that, as fealty to Jackson requires, it was reviewing evidence "as a whole" and not in a piecemeal fashion, it did the opposite; it isolated "some" evidence and (as did the prosecutors) ignored everything else; it also adopted as "fact" assertions made only by prosecutors and not supported by the record. The panel viewed the verdict as a mandate to begin review with a "presumption of guilt" and ended its inquiry, to use Chief Judge Newman's words, "upon noticing the existence of `some' evidence" consistent with its supposition. The panel completely ignored all evidence that either contradicted, refuted, was inconsistent with, or lent context to, the "modicum" of evidence it mustered, as the government and trial

court had done when construing Dr. Ross's *innocent* conduct as but a "cover" for his presupposed guilt.

2. As to "conscious avoidance"--the government's theory of guilt here--the panel, ignoring the need for heightened scrutiny in cases where the risk of convicting the innocent is higher than ordinary,[1] let stand a conviction

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[1]As Chief Judge Newman wrote in United States v. Martinez, 44 F.3d 148 (2d Cir. 1995); 1995 U.S. App. LEXIS 102, at * 16-17):

> It is true ... that a jury is entitled to draw inferences and, upon review of a guilty verdict, we are to assume that the jury drew in the Government's favor all the reasonably available inferences. But those axioms do not mean that every case in which there is some minimal evidence of guilt permits a jury reasonably to find guilt beyond a reasonable doubt. The line between permissible inference-drawing and impermissible speculation is often difficult to locate, especially in cases ... where the disputed element is state of mind. But the inability of juries to look inside a mind and determine intent with the same confidence that normally attends their determination of physical events does

(continued...)

based on an instruction that both omitted "balancing language" and did not even identify which "fact" was supposedly avoided. We argued that, if a conscious avoidance instruction is ever Constitutional in light of the Winship/Jackson requirements of proof of all elements of an offense beyond a reasonable doubt, the Constitution at least requires that the jury must be told that it must examine what a defendant actually believes about a specific "fact", so that the fact-finder can carefully focus on whether the fact was discerned but "consciously" "ignored", or whether it was never discerned at all

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[1](...continued)
not relieve courts of their duty to enforce the sufficiency threshold that governs the reasonable doubt standard. If anything, the inevitable uncertainty as to fact-finding about mental states should add rigor to the judicial function.

(with possibly "strange" conduct explained by confusion, not intent--a conclusion that the Second Circuit has been willing to reach about the government, see United States v. Millan, 17 F.3d 14 (2d Cir. 1993) (government's lack of diligence in investigating police misconduct characterized as "unconscious avoidance"), but not about defendants caught up in circumstances they, too, did not create nor appreciated.

The line between discernment and confusion is hardly a "technicality", as the panel's back-of-the-hand approach indicated it viewed the matter: it is the very line between guilt and innocence. The stakes are too high to give leeway.

In response to our petition, the Solicitor, after obtaining two extensions

of time from this Court to respond, ends up saying virtually nothing: merely parroting the government's brief to the Court of Appeals, it argues the same "facts" and plays word games. Though we showed through painstaking analysis in our appellate briefs that many of the assertions of "fact" had no record support, the Solicitor, obviously having made no serious inquiry, and citing only the government's brief and the panel's opinion, continues the unprincipled approach: That the Solicitor *still* argues that Dr. Ross met with staff to give them directives in a room where signs were located saying that old patients were not welcome, is shocking: Though this averment was made in the government's brief (C.A.Br.76) and "lifted" by the

Court of Appeals as "fact" (A.12), it simply never happened: no one said it did; as our brief showed, there were no signs in that clinic at the time; indeed, Medicaid's own witnesses saw no such signs at the time. **What is a defendant to do, however, if *no one* will look at the record?**

How can anyone say that the acceptance of facts not in the record comports with Jackson's requirement that only rational inferences can be accepted as support for a criminal conviction? How is it fair to allow argument, much less accept as fact, that, though the defendant had acted innocently, his conduct should be construed as a "cover" for guilt and then -- putting the cart before the horse -- use that "cover-up" "evidence" to

support a conclusion that the defendant consciously avoided the fraud and/or "knew" of it because he saw the "signs" and "covered up" his "guilt"? Certiorari should be granted to put teeth into Jackson's principles[2] and assure that

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[2]As this Court so eloquently put it in Jackson (443 U.S. at 316-17) (footnotes omitted):

The Winship doctrine requires more than simply a trial ritual. A doctrine establishing so fundamental a substantive constitutional standard must also require that the factfinder will rationally apply that standard to the facts in evidence. A "reasonable doubt," at a minimum, is one based upon "reason." Yet a properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt, and the same may be said of a trial judge sitting as a jury. ...

Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review all of the evidence is to be considered in the light most favorable to the prosecution. The criterion thus impinges upon "jury" discretion only to the extent necessary to guarantee the fundamental protection of due process of law.

The question whether a defendant has been convicted upon inadequate evidence is central to the basic question of guilt or innocence. The constitutional necessity of proof beyond a

(continued...)

innocent people are not wrongfully convicted.

As to the serious problems in the "conscious avoidance" charge, though the government admits that it supported an application for certiorari in Tomala v. United States, 504 U.S. 932 (1992), it departs from its then-principled view that there is need for Supreme Court guidance in this area. Despite the government's claim that, because the Court denied certiorari in Tomala, "[t]here is no reason for a different result here" (p.20), there is reason: The instruction here so far departed from any form of instruction "approved" by any court of appeals that, if ever constitutional--

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[2](...continued)
reasonable doubt is not confined to those defendants who are morally blameless.

which this Court did not have before it as an issue in Leary or Turner--the instruction given here did not convey the "balancing language" of the Model Penal Code charge to which the Court looked in those aged cases. When such language is omitted, the instruction is inconsistent with the requirement of proof beyond a reasonable doubt. Moreover, in Leary and Turner the Court was dealing only with the issue of "knowledge" of whether drugs were imported or not; it did not then, and never has, considered the use of such an instruction when the disputed issue is intent, as it is here. The proliferation of the "conscious avoidance" instruction indeed warrants this Court's review.

Nor was the extreme prejudice of the instruction alleviated (as the government

claims, pp.22-23) by a supplemental charge in response to a jury note. In the first place, the charge was not given, as the government claims, "as to the level of knowledge necessary to convict" (Br.23). The instruction was sought specifically by the jury "on the [RICO] conspiracy charge" and expressly concerned the phrase "impliedly or tacitly came to an understanding to violate the law'" on page 22 of the court's written instructions (Tr.2294). The court, moreover, had specifically suggested to the jury (Tr.2277) that it consider first the mail fraud counts, since they were predicates for the RICO counts, and then move on to the RICO substantive and conspiracy counts. The supplemental instruction thus had nothing to do with "knowledge" or

"intent to defraud", and at most confused the jury even more.

3. The government's description of the All Writs Act restraining order is equally unprincipled--and dead wrong. The government thus reports that, prior to trial, the court had entered a restraining order restraining "certain" of Dr. Ross's assets. It was all his assets.

The government reports that the order allowed release of $100,000 for attorney's fees "through sentencing". It allowed release of that sum for all times and purposes, including any appeal.

The government reports that the court issued the All Writs Act order under 28 U.S.C. 1651(a) only "until sentencing". There was, in fact, no expiration date--and the order is in effect to this date,

as I write this reply. The judge has refused at all times to allow Dr. Ross to use his funds for anything.

This case cries out for Supreme Court review because not only can the government use this tactic in all criminal cases; it is using it in other cases. Thus, the government points out (p.9 n.3) that the court had based its order on the restitution statute, 18 U.S.C. 3663(h)(1)(B), which permits an order of restitution to be "enforced" against a "judgment debtor" by, among other things, a restraining order. There was, however, no restitution order when the order was entered, and thus no judgment.

The restraint--against all of Dr. Ross's assets--was maintained by the Court of Appeals even though it remanded

because, in imposing restitution, the district judge had not considered the defendant's liabilities and his and his family's needs in any way. This has caused untold financial distress--including (as discussed during remand proceedings) insolvency of the innocent family. Moreover, it has caused disastrous results even though (as the Court may judicially notice), the district court, after extended litigation, ended up reducing the restitution amount to the sum initially recommended by the Probation Department--an amount which, if imposed initially, could have been bonded pending appeal. (Moreover, though the restitution statute provides [for good reason] that, unless otherwise stated, a defendant is not required to pay restitution until five

years after the end of supervised release, the judge ordered the "all-assets" All Writs Act restraining order maintained and ordered the defendant to convey his house to a receiver: the restitution order in fact must be satisfied "at once").

Nor did Dr. Ross's counsel "decline" any "invitation" to file a brief concerning whether the court had to consider defendant's Sixth Amendment rights to spend his own money for counsel before setting restitution and before restraining all of the defendant's funds "pending restitution". Counsel, having cited all the applicable law in this area --indeed, there is not much law because no court ever tried this tactic previously-- declined to file "additional" papers, because there was nothing more to say.

The district court had already declined to consider the defendant's liabilities or needs on the ground that all of Dr. Ross' money up to the "loss" amount (though representing funds for which Dr. Ross had worked hard in his life) "clearly belongs to the State of New York" (C.A.App.418) and because "restitution certainly is something that would take precedence over the desire of that defendant to use the funds to incur new obligations, even though that new obligation may be an obligation with respect to providing counsel for appeal, or any other expense that the defendant wishes to incur" (id.App.411). There was nothing more to say. All the arguments had been made; none was fairly considered. Not only are there enormous concerns under the

restitution statute; the Sixth Amendment implications are astounding. The matter is likely to arise in every criminal case where a defendant has assets and restitution is being considered. The effect will be not only to deprive third-party providers of what is due them from the defendant (because moneys needed to pay debts will be "frozen" to have them "available for restitution", as happened here) but a defendant will be deprived of the use of his own funds to hire counsel. This Court should grant certiorari.

4. Little can be said about the government's response to the RICO issues (pp.17-19). It has the sound of gobbledygook, because it is. If Congress meant to reach defendants who commit arguable misconduct for seven weeks and

then detach themselves, with no threat of continuity, then, despite the fact that the government relegates our argument to a footnote (p.19 n.7), RICO is unconstitutional. That Gilbert Ross supposedly "knew" that his sending of billings to Medicaid was "the clinics' regular way of doing business" (to use the government's words, p.19 n.7)) hardly supports a conviction under a draconian statute that increases personal penalties to include forfeitures and the pre-trial restraints, such as that imposed here. The Court of Appeals' ruling allowing liability for what others may have done stretches RICO beyond any limiting principle; with no limitation except prosecutorial whim, RICO must be deemed vague and unconstitutional. If RICO is

constitutional, there was plainly insufficient evidence of a "pattern of racketeering" here.

CONCLUSION

This Court should grant *certiorari* to enforce the standard of proof beyond a reasonable doubt, reign in the unprincipled uses of RICO and the All Writs Act, and enforce defendants' Sixth Amendment rights to defend themselves. It should tell the courts that they must take their obligations of review seriously, if for no other reason than that this is what the Constitution requires.

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